Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term 1999

N.T. BROTHER GREENE,

Petitioner,

v.

WILLIAM HACKETT, *et al.*,

Respondents.

Petition For a Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a *pro se* litigant with one or more viable constitutional claims, who earlier sought but was denied counsel, has appealed his "total case" in an appeal of an unappealable order which is pending before an appellate court, when the district court issues a final order dismissing his case for failure to amend, should the district court, in stewardship of the appellate court's jurisdiction, as a matter of due process and equal protection independently, or under 28 U.S.C. § 1915, be required to supplant the administration of equal access to justice by then providing counsel to advise on the need to appeal, or by providing notice of the need to appeal, in those districts which do not provide such notices.

LIST OF PARTIES

The following individuals or entities may have an interest in the outcome of this appeal:

Batson, John P. - Attorney for Plaintiff-Petitioner
Gilless, A.C. - Defendant-Respondent
Greene, N.T. Brother - Plaintiff- Petitioner
Hackett, William - Defendant-Respondent
Rolwing, Robert - Attorney for Defendants-Respondents
Shelby County, Tennessee - Entity Defendant of Sheriff and others
Vaught, (First Name Unknown) - Defendant-Respondent

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, N.T. Brother Greene, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The challenged opinion by a panel of the Sixth Circuit

is not published, but is reproduced in the Appendix, filed separately, at App. 36. The Sixth Circuit order denying rehearing is at App. 42. Neither of the Sixth Circuit Orders addresses the need to appoint counsel for advice on the need to appeal, nor addresses the fact that district courts in other circuits provide notice about appeal. The District Court's order denying the motion to appoint counsel is at App. 22. The District Court's Order denying the motion to extend time to appeal is herein at App. B 1 & B 2, but it does not address the issues raised in this Petition.

STATEMENT OF JURISDICTION

The Sixth Circuit entered its denial of a petition for rehearing on February 18, 2000. (App. 42). The petition for rehearing was timely filed.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

U.S. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENT I [1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or

naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without compensation.

AMENDMENT VII [1791]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT XIII [1865]

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1981. Equal Rights Under the Law.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1982. Property Rights of Citizens.

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 1915 (e)(1)

The court may request an attorney to represent any person unable to afford counsel.

STATEMENT OF THE CASE

The *pro se* Plaintiff filed a complaint of constitutional claims against a Judge, Sheriff, Deputy and unknown Deputies from Memphis, for violation of rights protected by the First, Fourth, Fifth, Eighth, Ninth, Thirteenth and Fourteenth Amendments, pursuant to 42 U.S.C. §§ 1981-1988, seeking damages, and declaratory and injunctive relief. (App. 1-8). Jurisdiction was conferred under 28 U.S.C. §§ 1331 and 1343(a)(3). (App. 3). Plaintiff sought a jury trial. (App. 8).

In the claim which relates to Plaintiff's inability to find counsel and the need for a notice regarding appeal, (See App. 20 & 21; 30-31), Plaintiff sued Judge Hackett, from a court in Memphis, Tennessee with jurisdiction over landlord tenant matters. Plaintiff is a landlord.

Judge Hackett jailed Plaintiff for six days without a hearing, because of a verbal exchange between the two in a courthouse hallway. (App. 1). The Complaint specifically alleged the communications were "not during any court or official proceedings." (App. 1). According to the Complaint, Judge Hackett volleyed the first unseemly shot about who was a liar. (App. 4). Judge Hackett called Greene a liar, or said something was a lie, and Greene responded. (*Id.*). Hackett upped the ante and said that what Greene had said was a "damned lie," to which Greene "responded in kind." (App. 4). Judge Hackett had Plaintiff arrested by a deputy standing nearby in the hall, who immediately took Plaintiff to jail. (*Id.*).

Judge Hackett is a White and Greene, is an African American, which Plaintiff alleged played an impermissable factor in his unlawful summary conviction and jailing. (App. 4). The fact Defendant Hackett is a judge and race were alleged to be a factor in the inability to find an attorney. (App.31).

The gravamen of Plaintiff's Complaint against Judge Hackett is that Plaintiff was jailed without notice of a charge, (App. 7, ¶ 22) meaningful notice or opportunity to be heard, all

in denial of equal protection. (App. 1-8).

Plaintiff suspected he had been arrested for criminal contempt of court (App. 1), but "[n]o mention was made of criminal contempt."[1] (App. 4).

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[1] The "charge" against Plaintiff is important because it was a factor in the District Court's decision to order Plaintiff to amend, which he did not do because he was "on appeal" of the reversal of the default and of the "total case". (App. 24). The District Court erroneously found that it was "unclear from the complaint as filed whether any claim has accrued as yet. . . Plaintiff shall . . . amend [ ] . . . explaining what charges were filed against him, and whether those charges have been resolved," (App. 18) citing *Heck v. Humphrey*, 114 S.Ct. 2364 (1994). (App. 17).

The Complaint neither expressly nor implicitly stated that charges were pending. The Complaint states that Plaintiff had been jailed for criminal contempt, although when the incident occurred Plaintiff had no understanding why he could be jailed for verbally defending himself in a courthouse hallway. (App. 1-8).

Respondent took the position in the Sixth Circuit that indeed Plaintiff had been arrested for criminal contempt under Tenn. Code Ann. § 29-9-102. Appellees' Brief at 19, *Greene v. Hackett, et al.*, No. 98-5831, (6th Cir.)(filed 1/25/99). Tenn. Code Ann. § 29-9-102 follows:

...(1) The willful misbehavior of any person in the presence of the court, or so near thereto as to obstruct the administration of justice.

...(4) Abuse of, or unlawful interference with, the process or proceedings of the court.

"Incarceration for up to ten days is provided at T.C.A.

The complaint alleged denial of medical care by the Sheriff individually, and in his official capacity. Greene, who was seventy-one, was recovering from prostate surgery and his abdomen was still bandaged, which needed changing. (App. 2, 4-5). Greene alleged medical conditions for which he required medications on a regular basis, which the jail did not provide on schedule. (*Id.*). Greene alleged he informed the Sheriff and the health personnel at this jail of his medical needs. (*Id.*).

Greene also alleged that some time later, when he returned to the Department to inquire about a separate matter, Defendant Deputy Vaught and the Unknown Deputy assaulted him, in part because of retaliation for filing internal grievances about his treatment while jailed. (App. 6).

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§ 29-9-103(b). Our state Supreme Court has ruled that,

> Conduct directed against the dignity and authority of the court or a judge acting judicially, or an act obstructing the administration of justice which tends to bring the court into disrepute or disrespect, constitutes criminal contempt.

Gunn v. Southern Bell Tel. & Tel. Co., 201 Tenn. 38, 396 S.W.2d 843 (1956), quoted at 7 *Tenn. Juris.*, Contempt § 7." Appellees' Brief at 19, *Greene v. Hackett, et al.*, No. 98-5831 (6th Cir.)(filed 1/25/99).

On the other hand, Plaintiff has asserted, and will assert, that Tennessee's summary criminal contempt proceeding, on its face, or as implemented in this circumstance, violates due process and equal protection.

On appeal Petitioner argued that Plaintiff was entitled to rest on his complaint as pleaded and that Plaintiff did not need to amend.

Greene served the Defendants by certified mail, who did not answer, so he moved for default, (R.6, Apx. pg. 17)[2] which the Clerk granted. (R.7). Defendants moved to open, (R.8) and to extend the time to answer. (R.9). Greene opposed the enlargement and sought default. (R.10, Apx. pg. 25). The District Court set aside the default on October 17, 1997. (R.11).

On the same day, by separate order, the District Court partially dismissed the Complaint, and ordered Greene to amend. (App. 9-19). (R.12). Greene had alleged some credit cards he had turned in during intake were taken and used. This claim was dismissed because the District Court found Tennessee afforded adequate remedy. (App. 11). The District Court dismissed the medical claims against the Sheriff in his individual and official capacities. (App. 12-15). The claims against Judge Hackett in his official capacity as claims against the State barred by the Eleventh Amendment. (App. 16).

As is reflected in n.1 above, the claim against Judge Hackett in his individual capacity was to be amended because the District Court was unsure what the charge was, and no outcome had been stated, and therefore under *Heck v. Humphrey*, the claim had not matured. (App. 17-18).

A claim against Unknown Deputies was dismissed. (App. 9 & 10). The District Court did not address the claim against Deputy Vaught (App. 6 ¶ 20) for excessive force and retaliation. (App. 9-19).

The Order gave *pro se* Greene twenty days to amend his Complaint. (App. 18). On appeal to the Sixth Circuit in the second appeal Greene argued that this order required a level of specificity which violated *Leatherman v. Tarrant County*

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[2] "R" refers to the document number in the District Court docket sheet. "Apx. pg." refers to the Joint Appendix page, filed with the Sixth Circuit Court of Appeals.

Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). Appellant's Reply Brief at 4, *Greene v. Hackett, et al.*, No. 98-5831, (6th Cir.)(filed 12/9/98).

After much of his Complaint was dismissed and he was ordered to amend that which was simply stated, Plaintiff Greene, feeling the waters starting to swirl around him, moved for appointment of counsel on November 7, 1997. (R.13, Apx. pg. 40). The District Court denied the appointment in a conclusory fashion and summarily considered whether exceptional circumstances existed, i.e. the type of case and Plaintiff's abilities to represent himself. (App. 22-23). The District Court concluded that "exceptional circumstances . . . do not exist at this time." (App.23). Plaintiff was given thirty days from November 10, 1997 to amend. (*Id.*).

The *pro se* Plaintiff then moved to recuse Judge Turner, because Judge Turner opened the default without giving Greene a hearing. (R.15). Judge Turner denied the recusal motion on December 1, 1997. (R.16, Apx. pg. 45).

On November 26, 1997, *pro se* Greene requested a hearing on the default, claiming he could prove personal service and knowledge, to show, in his view, entitlement to default; notwithstanding a court's discretion to open default. (R.17).

The District Court denied the request for a hearing on the default, and ordered the *pro se* Plaintiff to show cause why on December 25, 1997 he had not filed the previously ordered amendment. (R.18). The Court warned that failure to respond "may" result in dismissal for failure to prosecute under F.R.Civ.P. 41. (R. 18 at 3).

The Defendants moved to dismiss, asserting Plaintiff's failure to file the amendment as the basis. (R.19).

Pro se Plaintiff filed a motion requesting the District Court to respond to his motion requesting a hearing on the opening of default. (R.20).

The District Court denied Defendants' motion to dismiss

without prejudice on December 22, 1997. (R.21).

The *pro se* Plaintiff responded to the Order denying his request for a hearing on the opening of the default, proffering in a motion on December 26, 1997, that he could show "that someone has served all of the defendants on a specific date." (R.22).

The District Court denied the motion on December 30, 1997 to reconsider the opening of default, and reiterated that the Court had ordered the filing of an amended complaint, or a response. (R.23).

The Defendants refiled their motion to dismiss on January 6, 1998. (R.24, Apx. pg. 64-66).

On January 12, 1998, the *pro se* Plaintiff filed his first of Notice of Appeal of "the total case in order to preserve the substantive issues of this case for a later date in the District Court." (App. 24). (R.25). This first appeal was "pending" before the Sixth Circuit until May 1, 1998, when a Panel dismissed it for lack of jurisdiction because "no appealable order had been entered ... ." (App. 28 & 29). (R.30). No notice was sent to *pro se* Plaintiff explaining a "final" judgment. *See e.g.*, Civil Appeals Checklist (App.38)(Proper filing procedures for the Eleventh Circuit).

While Mr. Greene's "total case," in the first appeal was within it's the Sixth Circuit's plenary jurisdiction to determine whether a final order had been appealed, to which Mr. Greene was oblivious, the District Court issued an Order and Judgment on January 14, 1998, dismissing Plaintiff's complaint for "failure to prosecute," because Plaintiff did not amend his complaint. (App. 26 & 28). (R.27).

As mid-February came and went, no notice of the need to appeal was sent to Mr. Greene. The District Court did not reconsider whether "at this time" "extraordinary circumstances existed." As the time in which to file a motion to enlarge time to file an appeal passed, the District Court did not exercise the discretion of the appellate courts to ensure due process and

equal protection, as to the convergence of substance and procedure, of when to appeal.

On May 1, 1998, the Panel in the first appeal dismissed because there had not been an "appealable order." (App. 28 & 29). (R.30).

On May 13, 1998, *pro se* Plaintiff filed a motion to extend time to file appeal to the Sixth Circuit. (App. 30-32. (R.31). In the motion Greene alleged some of the facts of his Complaint, that White government officials violated his rights. (App. 30). He alleged Black citizens were especially afraid of city officials. (App. 30). Plaintiff said he could not get Black lawyers to represent him in this case with a White Judge. Plaintiff reiterated how he had tried to get lawyers from "Jackson, MS., Nashville, TN., St. Louis, MO., Little Rock, AR; and elsewhere." (App. 31). Plaintiff requested that the due process provisions help "restore the belief that it is no longer necessary to be scared and intimidated where your rights are concerned in Memphis, TN." (App. 31-32). On May 21, 1998 Greene amended his motion requesting the district court to grant him permission to appeal out of time. (App. 33).

On May 22, 1998, the District Court denied the motion to extend time to file the appeal. (App. B1 herein). (R.34). The District Court denied the motion to extend time to file a because the motion was filed more than thirty days after time to file, concluding it had no discretion. (App. B1). (R.34). The Court noted that Judgment was entered January 14, 1998, and the motion to extend was filed May 13th. (App. B1).

On June 4, 1998 the *pro se* Plaintiff filed his second notice of appeal, and queried in a footnote, "Why is it necessary for this plaintiff to pay another filing fee to have the judges rule on this appeal? If there was nothing for the appeal judges to consider, why must this plaintiff have to pay again to have his appeal considered by the Appeal Court judges now?" (App. 34-35). (R.36).

Respondents herein, Defendants Hackett, et al., filed a

motion to dismiss in the Sixth Circuit. *N.T. Greene v. William Hackett, et al.*, No. 98-5831 (Filed 8/19/98). The undersigned filed a Notice of Appearance on August 20, 1998. On Plaintiff Greene's behalf, a response to the motion to dismiss was filed September 2, 1998. The Sixth Circuit denied the motion to dismiss.

In relationship to this certiorari petition, Petitioner Greene raised the following issue in the second appeal to the Court of Appeals Sixth Circuit:

> I. The district court erred in exercising or failing to appropriately exercise, the stewardship of this court's appellate jurisdiction.

Three other issues were raised regarding the viability of the Complaint, but are not determinative as to the questions presented for certiorari. (Appellant's Brief at 2, *Greene v. Hackett, et al.*, No. 98-5831, (6th Cir.)(filed 10/26/97)).

Plaintiff argued to the Sixth Circuit that under the circumstances here, a notice of the need to file a second notice of appeal, or to appoint a lawyer to advise about the need to file a second appeal, should have been provided, to ensure fundamental fairness; or another corrective measure should have been imposed. Plaintiff pointed out that when to appeal was a matter for the appellate courts, in consideration of a governmental system for the administration of justice. Plaintiff argued that other circuits, by way of their district courts, provided notice, or an attorney could be provided simply, to advise when to appeal. Examples were given of notices provided to persons traversing the waters from administrative shores to judicial shores.

On December 17, 1999 the Panel issued the opinion which is the basis of this petition. (App. 36). The Panel determined that the District Court did not abuse its discretion in denying the extension of time in which to file the appeal because it lacked authority to grant an untimely motion. (App.37). The Panel did not address appointment of counsel

nor providing notice of the need to appeal.

A Petition for Rehearing With Suggestion for *En Banc* Rehearing was filed December 31, 1999. The petition included an Attachment B which was a Civil Appeals Checklist from the Eleventh Circuit given to litigants in the Southern District of Georgia. (App. 38-41). The Petition for Rehearing was denied on February 18, 2000. (App. 42).

REASONS FOR GRANTING THE WRIT

When a *pro se* litigant with one or more viable constitutional claims, who earlier sought but was denied counsel, has appealed his "total case" in an appeal of an unappealable order which is pending before an appellate court, when the district court issues a final order dismissing his case for failure to amend, should the district court, in stewardship of the appellate court's jurisdiction, as a matter of due process and equal protection independently, or under 28 U.S.C. § 1915, be required to supplant the administration of equal access to justice by then providing counsel to advise on the need to appeal, or by providing notice of the need to appeal, in those districts which do not provide such notices.

This case asks this Court to address the question of appellate jurisdiction to ensure the fair and efficient administration of a *pro se* litigant's entry into the appellate system by notice about the determination of when to file an appeal based on a final order, or the appointment of counsel for that purpose.

Some districts provide such a notice while others do not. As a manner of speaking, there is a split in the circuits or districts – albeit *de facto*.

The District Court erred in its stewardship of appellate court jurisdiction. The District Court was deliberately indifferent to a prior request for counsel and Plaintiff's inability

to find counsel because a defendant was a judge, and because of race.

Plaintiff sought, but was denied counsel. The District Court found that the "exceptional circumstances," that is the type of case and the ability of Plaintiff to represent himself, did "not exist at this time." (App. 22 & 23). At some point in the proceedings, if notice of the need to appeal were not meaningfully provided, then *sua sponte* the District Court should have reconsidered the appropriate factors to appoint. *Poindexter v. FBI*, 737 F.2d 1173, 1984 U.S. App. LEXIS 21116, at **18, n. 8 (U.S. App. D.C. 1984).

Petitioner suggest that this decision, while implemented by the district court in the first instance, should be reviewed *de novo* by the appellate court. Either the notice reviewed as to meaningfulness under the circumstances, or the appointed decision reviewed consistent with *Poindexter v. FBI*, 737 F.2d 1173, 1984 U.S. App. LEXIS 21116, at **18, n. 8 (U.S. App. D.C. 1984).

Under the circumstances of this case, a notice of the need to appeal should have been provided, or a lawyer appointed to advise this *pro se* Plaintiff,[3] who filed a premature notice of appeal of the "total case," of the need to file a second notice of appeal after entry of the "final order."

The record reflects a plaintiff confounded by the course of these particular proceedings, who had sought, but was denied, appointment of counsel, in an action where he sued a Memphis Judge for jailing him, without even a semblance of a trial, for comments he made to the Judge, in response to

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[3] The ranks of *pro se* litigants are ever increasing. This Court may take Judicial Notice of the reports from the Administrative Office of the United States Courts which reported on 12/28/99 that there were 54,693 cases commenced, of which 24,416 were *pro se* at filing.

untoward comments by the Judge, outside of a judicial setting.

This Court has jurisdiction to address that portion of appellate court justice administration which, of necessity, occurs while the litigant is in the district court. This case addresses the administration of justice in protection of the very beginnings of the appellate process. The issue is about a litigant's knowledge of when to file a notice, or in this case, a second notice, of appeal.

Even though in a fundamental sense the line of jurisdiction between the district and appellate court is drawn with the filing of the notice of appeal, and although the right notice at the right time was not filed here, the issue here is a matter of primary appellate concern, and could be characterized as a plenary jurisdiction, administrative concern of an appellate court. *See e.g., Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998)(appellate jurisdiction to address notice requirement to respond to summary judgment). This Court has an interest in creating an appellate system which avoids appearance that access to appellate review is controlled by the district court.

Like the criminal defendant's protection of important rights a civil litigant is at a critical stage, bearing upon protection of fundamental rights, when an order is issued which is adverse, and the order is palpably final, and the thirty days to appeal had begun. The critical nature of filing the notice is clear.

> "the failure to file a requested appeal constitutes *per se* ineffectiveness, a petitioner need not demonstrate prejudice, that is, that his attorney's failure to file the requested notice jeopardiz[es] a substantial prospect of success on appeal." *Castellanos [v. United States]*, 25 F.3d [717], at 718 [(7th Cir. 1994)].

Schmude v. U.S., 151 F.3d 1033, 1998 WL 433015, 2 (7th Cir. 1994). When to appeal, especially in light of a previous appeal, and the final order doctrine, and a disappearing jurisdiction of

an apparent appeal makes determination of that critical stage elusive, in the least.

There is a growing belief in the Circuits of the need to provide to the ever-increasing number of *pro se* litigants notice of their right in the next step of the process to protect substantive justice. The following reflects Circuits which require notice to a *pro se* litigant of the need to respond to summary judgment, without resort to a harmless error examination. *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998)(*pro se* prisoner entitled to "fair notice of requirements of summary judgment"); *Hudson v. Harly*, 412 F.2d 1091 (D.C. Cir. 1968)(Terminal Fair Notice Case); *Champion v. Artuz*, 76 F.3d 483, 486 (2nd Cir. 1996); *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Cir. 1975); *Lewis v. Faulkner*, 689 F.2d 100, 102 (7th Cir. 1982)(notice to *pro se* prisoner of consequences of failure to file); *Griffith v. Wainwright*, 772 F.2d, 822, 825 (11th Cir. 1985)("adverse party" must be given notice). *But see, Williams v. Bowman*, 981 F.2d 901, 903 (6th Cir. 1952)(no authority within the circuit); *Martin v. Harrison Co. Jail*, 975 F.2d 192, 193 (5th Cir. 1992).

The Plaintiff can hardly be faulted for lack of trying. Plaintiff filed a premature notice of appeal on the "total case." It was counter-intuitive to file a second notice. Plaintiff previously sought appointment of counsel, who by review of the record later in the proceedings was lost in the procedure. This Plaintiff could not find a lawyer who would sue a Judge.

He thought he had a procedural default and got lost in trying to maintain it. He was not dilatory in filing his appeal, in fact an appeal was filed prematurely, to preserve the "total case" and appeal his procedural default issue.

When the final order for failure to amend was issued Plaintiff thought he already had an appeal to the "total case" in the jurisdiction of the Appellate Court.

The "time" had come to the District Court to give notice of the need to appeal or appoint a lawyer. (App. 23). Nothing

was done even after the first thirty days had run, and Plaintiff sought appellate review of the "total case," Plaintiff had been blind-sided by filing the early appeal. No notice or warning was given by the District Court. The District Court failed to reconsider appointment at that time.

This case asks this Court to import the practice of requiring notice of the need to respond to summary judgment, used in a majority of Circuits, to the situation here, as to the notice of the need to appeal after a final order. Help was sought, and not provided. A majority of the circuits require notice to *pro se* litigants in summary judgment proceedings, and this case asks this Court to apply that rule as to notice of the need to file an appeal, or to provide an attorney to convey that knowledge, where attempted active protection of rights caused the exact opposite and fundamentally unfair result, because of the oft elusive "final order" doctrine.

Petitioner suggests that whether to appoint counsel to advise on when to appeal or whether to provide any notice of the need to appeal identifying appealable final orders should be a standard determined *de novo* on appeal by appellate courts, and not a review of a district court's exercise of discretion. Protection of appellate court jurisdiction and access to appellate courts should not be determined as a constitutional matter by the court from which a litigant seeks appellate relief.

Courts have recognized four factors to consider in the appointment of counsel:

> (1) the ability of the plaintiff to afford an attorney;
> (2) the merits of the plaintiff's [**37] case;
> (3) the efforts of the plaintiff to secure counsel; and
> (4) the capacity of the plaintiff to present the case adequately without aid of counsel.

Poindexter v. FBI, 737 F.2d 1173, 1186, 1984 U.S. App.

LEXIS 21116, at **37 & **38 (U.S. App. D.C. 1984)("While these factors ordinarily should be considered by the trial court, this list is not necessarily exclusive.").

Even if a *pro se* were wealthy,[4] where the presence of a particular defendant has made it difficult to obtain counsel, the factors of ability to pay must by considered in light of the litigant's ability to pay not just a reasonable fee, but a premium which would attract competent counsel willing to forego the loss of business or income which would follow representation against the powerful Defendant. *See e.g., Caston v. Sears, Roebuck & Co.*, 556 F.2d 1305, 1309 (5th Cir. 1977)(inability of plaintiff to find counsel because of unpopularity in some locations). "[T]here will also be cases in which an analysis of one of the factors we have enumerated will be dispositive, obviating the need for consideration of the other factors." *Poindexter v. FBI*, 737 F.2d 1173, ___ 1984 U.S.App. LEXIS 21116, [**39] (U.S.App.D.C. Cir. 1984). In this case, perhaps the fact that Plaintiff has sued the Judge in Memphis will prove to be dispositive.

Providing a notice to a *pro se* would in most circumstances be an effective solution. In those circumstances where there was a possibility of meritorious claim, and it had earlier been found that the particular litigant could understand and present the claim, it is likely a simple notice would meaningfully inform the litigant of his obligations in order to seek appellate review of substantive matters. If the particular litigant, or the circumstances made it likely that the particular litigant could not protect his rights, then an attorney would be

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[4] The fact that Plaintiff had some money should not preclude consideration of the other factors. A litigant need not be destitute nor proceeding *in forma pauperis* to obtain counsel. *Poindexter v. FBI*, 737 F.2d 1173, 1984 U.S. App. LEXIS 21116, at **40 (U.S. App. D.C. 1984).

appointed to advise the litigant about when to appeal. The District Court could even have a hearing to notify the litigant of rights.

Further, as to the factor of meritorious claims, where qualified immunity is afoot, and the "clear" meaning of the Constitution at stake, not only for the parties, appointment of counsel is necessary as a matter of public interest. *See e.g., Hyman v. Rickman*, 446 U.S. 989, 100 S.Ct. 2976, 64 L.Ed.2d 847, 1980 LEXIS 1965 (1980)(Blackmun, J., Brennan J., Marshall, J., dissenting).

This Court, as a matter of administering its jurisdiction, has reason to require district courts to either send out clear notices to all litigants that a particular decision is a "final order," and that if review is desired, an appeal should be filed within thirty days. Concomitant with that, should be the obligation of a district court, on behalf of a court of appeals to send notice to a *pro se* litigant, who has prematurely filed an appeal, that a subsequent appeal notice may need to be filed, or at that point, to provide an attorney, for the limited purpose of advising the *pro se* litigant, when an appeal must be filed.

This case asks this Court to take a duty-bound simple step, which can be justified a thousand times over in the name of fundamental fairness, due process and efficiency. This case asks that litigants be given a notice regarding appeal, at appropriate times, similar to the Civil Appeals Checklist. (App. 38). This appeal seeks a ruling that the process afforded Mr. Greene was Constitutionally infirm because no such notice was provided, and therefore that he be made whole by being allowed to have his appeal deemed timely. Alternatively, it seeks *de novo* appellate jurisdiction over the *sua sponte* need to reconsider appointment of counsel to safeguard the key to the appellate process.

The *de facto* rule of the Eleventh Circuit's administrative processes, to guarantee a fair first step of the appellate process, should become the *de jure* rule of all Circuits. This case has all

the factors to compel such a result. Substantively and procedurally this is a worthy case.

Because more and more litigants are *pro se*, entry into the appellate system, should be available in a fundamentally fair and efficient way; other than having an appellate Court tell the litigant, for the first time, the order appealed was not appealable. This Court knows the judicial resources which are spent on the final order issue, and realizes how much would be saved by notice to litigants, *pro se* or represented.

CONCLUSION

For the reasons stated the petition for the writ of certiorari should be granted.

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App. B 1

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

N.T. BROTHER GREENE,	)	FILED MAY 22 1998 ROBERT DI TROLIO, Clerk (R.34)
Plaintiff,	)	
(5)	)	
	)	CIVIL ACTION
WILLIAM HACKETT, et al.,	)	NO. 97-2799 TUV
Defendants.	)	

ORDER ON MOTION TO EXTEND TIME TO FILE THIS APPEAL TO THE 6TH U.S. CIRCUIT COURT

The pro se plaintiff has filed a motion with this court requesting that the court extend the time within which the plaintiff may file an appeal from the judgment of this court.

On January 14,1998, the court dismissed this case with prejudice. A judgment was entered on January 20, 1998. Thus, the plaintiff's motion, filed on May 13, 1998, is presented to the court approximately four months after the entry of judgment.

Rule 4(a)(5) of the federal Rules of Appellate Procedure provides that:

> The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4 (a).

Although no showing has been made of excusable neglect or good cause, the district court has no authority to

extend the time to file a notice of appeal when such a motion is filed more than 30 days after expiration of the time prescribed by Rule 4(a). Rule 4(a)(1) allows a notice of appeal to be filed within 30 days after the date of entry of the judgment. Therefore, the time within which this court's authority to extend the time to file a notice of appeal expired in March of 1998.

This motion to extend time to file an appeal is therefore denied.

IT IS SO ORDERED this 22nd day of May, 1998.

/s/ Jerome Turner
U.S. District Judge